NO. 20150

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 20150

JOSEPH SICA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court,
For the Southern District of California,
Central Division

OPENING BRIEF OF APPELLANT JOSEPH SICA

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TO THE HEAD JUDGE AND JUDGES OF THE ABOVE-ENTITLED COURT:

COMES NOW the appellant, Joseph Sica, and respectfully files this, his opening brief; and by reason of the fact that these proceedings were carried on in the lower court in effect jointly (there was a joint hearing at which the arguments made by one were the arguments adopted by both), we have taken the liberty of referring to the brief filed on behalf of Paul John Carbo and throughout will refer to it and, with the Court's permission, will adopt portions of it, in the interest of brevity.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The District Court for the Southern District of California, Central Division, had jurisdiction under 28 USC 2255, this being a proceeding to vacate and set aside sentences theretofore imposed in a criminal case, and for other relief pursuant to that section. The case in the lower court carried the number 65-91-BOLDT (Ancillary to No. 27973 CD). (CT 111)[1].

This is an appeal from the judgment denying relief, entered on March 9, 1965 (CT 122). Notice of appeal was filed on March 22, 1965 (CT 124).

[1] The record certified to this Court consists of the Clerk's Transcript (CT), the Reporter's Transcript of the hearing below (RT) and three exhibits. In accordance with Rule 18(2)(f) of this Court, the list of exhibits is set out as Appendix A hereto.

This Court has jurisdiction of the appeal under said 28 USC 2255 and under 28 USC 1291, 1294(1) and 2107.

STATEMENT OF THE CASE

Facts

After there had been jury verdicts of guilty, but before sentence and while there were pending motions for new trial, Hon. Ernest A. Tolin, the judge who had tried the case, passed away (CT 5-6). Pursuant to Rule 25 of the Federal Rules of Criminal Procedure, Hon. George H. Boldt was designated as successor judge (CT 6). Thereafter, defendant in the criminal action, petitioner and appellant here and hereinafter designated as petitioner, filed a supplemental motion for new trial urging that pursuant to Rule 25 the successor judge could not perform the duties required of him in passing upon the motions for new trial, because credibility and conflict-of-evidence questions were among the issues in said motions, which issues the successor judge was in no position to resolve, he not having presided at the trial, and, accordingly, under the Rule, a new trial should be granted (CT 6).

The supplemental motion was denied, the motions for new trial were denied, and petitioner was sentenced (CT 6). On appeal, this Court affirmed (CT 5; 314 F. 2d 718) and the

United States Supreme Court denied *certiorari* (CT 5; 377 US 953).

Following the return of the mandate upon denial of *certiorari*, petitioner timely filed, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, a motion for modification of sentence, which duly came on for hearing before the District Court, Judge Boldt presiding (Exhibit 3). At the time of the hearing of the motion, after counsel for petitioner and other defendants who had made similar motions had made their argument, and during the time Judge Boldt was announcing his ruling denying the motions, Judge Boldt said (RT 38-39; Exhibit 1):

> "Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. And I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at the other ends of the same hall during the same period and we quite often saw each other at lunch, and I had occasion to see Judge Tolin after the verdict in this case, and before my case was concluded, and I had some ideas of his views of the case.

> From that I can say and affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed."

This was the first time petitioner or his counsel knew or had any reason to believe that prior to his appointment as successor judge, Judge Boldt had discussed the case with Judge Tolin or that he had any knowledge of the case or Judge Tolin's views thereon (CT 7).

Following the conclusion of the hearing on the motion for modification of sentence, Judge Boldt instructed the court reporter, Samuel Goldstein, not to deliver to counsel the reporter's transcript of the proceedings until after Judge Boldt had seen his remarks (RT 35-36). Accordingly, Mr. Goldstein submitted to Judge Boldt a verbatim transcript of the proceedings (RT 34, 38, 39, 41) and, pursuant to the Court's instruction, did not deliver copies to counsel (RT 36-37). After he received the transcript from Mr. Goldstein, Judge Boldt made changes thereon in his own handwriting (RT 34; Exhibit 1) and instructed Mr. Goldstein to rewrite the transcript to read as changed, before filing the original or releasing copies (Exhibit 2).

The transcript thereafter received by counsel from the

court reporter (RT 36) read, as changed per Judge Boldt's instructions (RT 39, 41; Exhibit 3, p. 25), as follows:

(words deleted are crossed out, thus: ~~----~~; and words added are underlined, thus: ____)

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. ~~And~~- I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at ~~the other~~- opposite ends of the same hallway during the same period and ~~we~~- quite often saw each other at lunch-~~;~~- . ~~and~~-I had occasion to ~~see~~- talk with Judge Tolin after the verdict in this case, ~~and~~- before my case was concluded, and ~~I had~~- received some ideas of his views ~~of the~~- after the verdict in this case. ~~From that~~- I can--~~say and~~- affirm without any question whatever that the sentences I imposed ~~;I believe;~~- were more lenient than those~~that~~- Judge Tolin ~~would~~- might have imposed."

Subsequent thereto, appellant herein, Joseph Sica, filed his petition (CT 94) and motion (CT 111)[2] under 28 USC 2255, on the ground that he had been denied due process of law, in violation of the Fifth Amendment to the United States Constitution, in that (1) the successor judge had received, prior to his appointment, information *coram non judice* concerning the case pertaining to matters upon which he was thereafter to adjudicate in motions for new trial, (2) the successor judge relied upon such information in exercising his function in passing upon the motions for new trial, and (3) that these facts were not known to said petitioner Sica or his counsel until after petitioner had exhausted his right to appeal, including petition for writ of *certiorari* in the United States Supreme Court.

In his 2255 motion, petitioner Sica asked (CT 111) that a United States District Judge other than Judge Boldt pass upon the 2255 motion, that Judge Boldt be a witness at the hearing of the 2255 motion, that the sentences previously imposed be vacated and set aside, that the order previously made denying petitioner's motions for new trial be set aside, and that a successor judge other than Judge Boldt be appointed pursuant to Rule 25 of the Federal Rules of Criminal Procedure,

[2] "Motion Pursuant to 28 USC 2255 To Vacate And Set Aside Sentence And For Other Relief" is annexed hereto as Appendix C.

to pass upon petitioner's motions for new trial. All of these were denied petitioner (CT 78, 122).

Prior to the hearing on the 2255 motion, after learning that Judge Boldt had been assigned to hear the motion, petitioner Sica filed his objections to Hon. George H. Boldt presiding at the hearing in connection with this matter, or acting in any manner (CT 114)[3].

Also prior to the hearing on the 2255 motion, Judge Boldt, *sua sponte,* filed an affidavit setting forth a version different both from what he had said from the bench during the motion for modification of sentence proceedings and as he had had the reporter's transcript changed, and setting forth an explanation (CT 30-32).

At the hearing of the 2255 motion, although advised by counsel for petitioner (RT 9-10) that it was their desire to call him, Judge Boldt, as a witness in the proceedings (because the Judge's statement from the bench in the motion for modification of sentence hearing, and the changes in the reporter's transcript made thereof, and the Judge's affidavit concerning said statement furnished a basis therefor), and

[3] "Objections To Judge Honorable George H. Boldt, U.S. District Judge, Presiding At The Hearing In Connection With This Matter, Or Acting In Any Manner" is annexed hereto as Appendix D.

that questions would be asked Mr. Goldstein, the court reporter, concerning communications between the two of them (RT 10), Judge Boldt refused to permit another judge to hear the motion (RT 29).

During the hearing on the motion, Judge Boldt refused to permit himself to be called as a witness (RT 58, 65) or to be interrogated concerning the matter (RT 58, 63, 66), and after making a statement as to certain questions counsel had proposed to ask him (RT 57-58), ruled that the affidavit he had filed "fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding" (RT 58). When counsel urged that the Court was denying the right to cross-examine an important witness, which is essential to due process of law (RT 66), the Court replied, "I do not agree, and your application is denied." (*ibid*) When counsel, pursuant to the Court's order that an offer of proof be made (RT 53), offered to prove, if the judge would submit to questioning, that there were variances, inconsistencies and conflicts in the various statements the judge had made and that was all they could offer at the time, "because we don't know what is in your Honor's mind" (RT 62), the Court interrupted and replied (*ibid*), "You do know what is on my mind because I have made a statement about it."

On the merits of the 2255 motion, the Court denied any relief (RT 26). Hence this appeal.

Questions Involved

1. Is due process of law denied where the only witness to the events giving rise to a claim for relief under 28 USC 2255 presides as judge at the hearing which was brought for the precise purpose of obtaining a judicial determination as to whether the conduct of the witness denied due process and a fair trial at a previous proceeding and where the said only witness is not allowed to be called or sworn as a witness nor allowed to be cross-examined?

This question was raised in the 2255 motion itself (Appendix C hereto) and by written motion (by both Carbo and Sica) addressed to the Chief Judge or Acting Chief Judge of the court below, prior to the hearing of the 2255 motion and immediately upon it being known to counsel for petitioner that the hearing on the 2255 motion had been assigned to the very judge whose conduct was the subject of the 2255 motion (CT [Carbo] 33-44). The motion was denied (CT [Carbo] 58).

The question was likewise raised by written motion addressed to the said judge whose conduct furnished the base

for the 2255 motion and to whom the said 2255 motion had been assigned for hearing (CT [Carbo] 75-76). The motion was denied (RT 29).

The question was also raised during the hearing on the 2255 motion, when the witness - who was then presiding as judge - was called (RT 53, 65) but refused to be sworn or interrogated (RT 58, 63, 65, 66).

2. Is a defendant in a criminal case denied due process of law and a fair trial on his motion for a new trial where the judge who was assigned to hear the matter as successor judge under Rule 25 of Federal Rules of Criminal Procedure, prior to his assignment and unknown to the defendant or his counsel, obtained information *coram non judice* upon which he relied in exercising his function as successor judge?

This question was raised by the motion pursuant to 28 USC 2255 and the oral proceedings held thereon (RT 30 - 76).

SPECIFICATIONS OF ERROR

1. The trial court erred in denying appellant's motions that a judge other than the Hon. George H. Boldt preside at the hearing of appellant's motion made pursuant to 28 USC 2255 and in allowing Judge Boldt to preside at the hearing of said 2255 motion.

2. The trial court erred in not requiring the Hon. George H. Boldt to be sworn as a witness and to testify at the hearing of appellant's motion made pursuant to 28 USC 2255.

The evidence sought to be elicited from Judge Boldt as a witness were answers to the questions (CT 42-44; RT 55, 61) set out in Appendix B hereto and incorporated herein as though fully set forth, and answers to such further questions as would appear appropriate depending upon the answers to the specific questions put.

In objecting to the refusal of Judge Boldt to be sworn as a witness or to answer the questions, counsel for petitioner Carbo urged (RT 59-61):

> "MR. WIRIN: Your Honor has said, and I haven't the slightest doubt but what your Honor has said in good faith, that your Honor is of the view that the statement which your

Honor made under oath disposes of or answers the portion of the questioning to which your Honor has referred.

. . .

"MR. WIRIN: But, of course, your Honor, it is a matter about which there might be honorable differences of opinion.

. . .

"MR. WIRIN: For instance, we who are sitting at the counsel table, and who are advocates -- not judges but advocates -- may have a point of view that precise interrogation, indeed cross-examination, often brings to light that which otherwise is not illuminated.

"Now then, your Honor, so there may be difference of opinions, your Honor, between judge and counsel; and counsel could in good faith believe that by questioning a person who has made a statement, they can bring out matters which are not as clear to them as it appears to be to the person who made the statement . . .

"(MR. WIRIN) . . . Shouldn't the judgment

as to whether or not counsel should have the right to interrogate your Honor in connection with the statement which your Honor made under oath, which your Honor now says covers and answers adequately all of the questions pertaining to that statement which we seek to propound, shouldn't a person of a different mind than your Honor, and other than your Honor, make that judgment, rather than your Honor who, whether you like it or not, perforce, of necessity and circumstance, really is passing judgment upon your own statement. And you are saying, 'My statement' -- you are saying what a witness would say to a lawyer. 'I have answered your question.' But the witness can't say that to a lawyer. Only an impartial judge can say to a lawyer that his questions have been answered.

"So your Honor, it seems to me, ought to, with the graciousness and humility which becomes a judge of the United States District Court, let some other person sit as judge over this matter with respect to the question as to whether or not your Honor's statement answers

all of the questions which we seek to propound."

Counsel for petitioner Sica stated[4] (RT 65-66):

"MR. PARSONS: . . . In connection with my request to call you as a witness I have before me a record which indicates that on July 17th you said, 'I had occasion to talk with Judge Tolin after the verdict in this case, before my case was concluded, and received some ideas of his views after the verdict in this case . . .

"It is my desire to question you about that conversation; where it took place, who, if anybody, was present, and what was said by either you or Judge Tolin at that time."

Upon the Court's refusal to permit, counsel stated (RT 66):

"May I say this, with all due respect to your Honor, you are denying us the right to examine an important witness which is essential to the establishment of due process

[4] The Court had previously ruled (RT 47) that "(e)verything that goes in will be applicable to both petitions. . . . And everything that is said will be applicable to both, unless it is clearly indicated otherwise."

of law."

To which the Court replied (*ibid*):

"I do not agree, and your application is denied."

3. The trial court erred in denying appellant's 28 USC 2255 motion, and each part thereof.

ARGUMENT

Summary of Argument

Appellant was denied due process of law and a fair hearing both at the motion for new trial proceedings in the criminal case and in the 28 USC 2255 proceedings filed upon his learning of the defect in the motion for new trial hearing.

As to the former, appellant contends that it is a denial of due process for a judge to preside at a matter as to which he had received, unbeknownst to the defendant, information *coram non judice*.

As to the latter, the 2255 proceedings, appellant contends that where the only witness to what that information *coram non judice* is, is the judge who presides at the hearing, who has, by causing changes to be made in the reporter's transcript,

made two different versions of the matter, and who thereafter in response to 2255 proceedings makes still a third and different statement as to what occurred, that that judge should not preside at the 2255 hearing and should be a witness therein. Appellant argues that his hearing presided over by said judge, and the judge not having permitted himself to be a witness or to be cross-examined, denied to him due process of law and, additionally, that for considerations of the fair administration of justice, such a proceeding should not be permitted to stand.

I

APPELLANT WAS DENIED DUE PROCESS OF LAW IN HIS 2255 HEARING, IN THAT THE PROCEEDING WAS PRESIDED OVER BY THE JUDGE WHOSE CONDUCT WAS THE SUBJECT OF THE 2255 MOTION AND IN THAT SAID JUDGE WAS NOT PERMITTED TO BE SWORN AS A WITNESS, NOR TO TESTIFY, NOR TO BE CROSS-EXAMINED

" . . . no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

In re Murchison, 349 US 133, 136.

This principle would appear to be so ingrained in the law and in the Constitution as not to require discussion. The reason is manifest.

In *In re Murchison, supra,* where a one-man-judge grand jury heard the matter of an alleged contempt for what had occurred in the one-man grand jury investigation, the Court said (349 US at 138-139):

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than the testimony given in the open hearings. That it sometimes does is illustrated by an incident which occurred in White's case. . . . Thus the judge, whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.
>
> " . . . There was no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place

in the secret chambers of the judge. If there had been they might have been able to refute the judge's statements about White's insolence. . . . If the charge should be heard before that judge (the one-man grand jury one), the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. . . . "

Similarly, in

Offutt v. United States, 348 US 11, 15:

" . . . The real issue is whether . . . such a ruling should have been made by the trial judge, or whether for the purpose of vindicating justice . . . the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt

should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct."

And, at page 17, the Court said:

"Our concern is with the fair administration of justice."

The applicability of these principles to the case at bar is clear.

Here, the clear import of Judge Boldt's initial statement from the bench during the motion for reduction of sentence proceedings (Exhibit 1), was that he had discussed the case with Judge Tolin both before and after the verdict, had become familiar with "Judge Tolin's views of the case," and "(f)rom that I can say and affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed" (emphasis added). This, in and of itself, is sufficient to call for an inquiry into just what that *coram non judice* information was, so as to make sure that the defendant was afforded a hearing before a judge and in a tribunal to which he was entitled. Such an inquiry should be conducted before a judge whose conduct was not being inquired into, and such other judge should be the one to pass upon the import of the matter after seeing and hearing the participant as a witness.

But the matter became even more complex when, as it turned out, Judge Boldt caused changes to be made in his remarks for the official version of the transcript. In the second statement (Exhibit 3, p. 25), the time of the conversations between Judge Boldt and Judge Tolin is shifted to after the verdict (rather than before and after). The phrase "of the case" was ordered deleted and the phrase "after the verdict in this case" ordered inserted in lieu thereof. Moreover, the positiveness of Judge Boldt's assurance that Judge Tolin would have imposed more severe sentences is diluted by his ordering the word "would" stricken and the word "might" substituted therefor (Exhibit 1). Additionally, by directing the court reporter to excise completely from the transcript the words "From that," Judge Boldt altered the meaning because, with that phrase, it is clear that Judge Boldt was saying, in effect, that he had learned Judge Tolin's views from Judge Tolin. Even as changed, the statement in the transcript (Exhibit 3, p. 25) is still to the effect (1) that Judge Boldt had in mind Judge Tolin's views of the case, and (2) that he received those views from Judge Tolin by talking about them with Judge Tolin.

So again, and in addition, the inquiry as to just what occurred should have been conducted by a judge other than the one whose conduct is involved and whose testimony should have

been heard and seen by such other judge.

But the filing, *sua sponte*, by Judge Boldt of his affidavit (CT 30-32) after the 2255 motion was filed, and the use thereof made by Judge Boldt at the hearing, surely makes it completely manifest that Judge Boldt should have been a witness in the case and should not have presided over the proceedings. By that affidavit, Judge Boldt personally involved himself as a person and sought to explain and present the facts of the matter. In that affidavit, Judge Boldt asserted: That "Neither the matter of sentence, nor any evidence, procedure, issue or ruling involved in Cause #27973 CD was ever so much as mentioned to me or in my presence by Judge Tolin at any time or place" (CT 31), and that the "views" of Judge Tolin came to be known to him, Judge Boldt, or were "derived solely from the appearance and manner of Judge Tolin which to me indicated he was laboring under a heavy burden of concern and strain each time I saw him during the trial" (CT 30).

And so, by *ex parte* and self-serving statements, and in response to the 2255 motion, Judge Boldt asserts that solely because of the appearance of another judge, that judge, in the course of a long trial, "was laboring under a heavy burden of concern and strain," he was able to (and did)

assure defendants, their counsel and the public "without any question whatever" that the sentences imposed "were more lenient than those Judge Tolin would (might) have imposed" (Exhibit 1; Exhibit 3, p. 25).

Surely these conflicts and variances should be resolved and they could only be resolved in the manner devised by Anglo-Saxon jurisprudence -- by questioning the witness whose statements are being examined in open court before a judge who is not himself involved in them.

The actual hearing at which appellant's counsel sought to bring forth the facts demonstrated that that occurred against which the Supreme Court had set its face in *In re Murchison*, *supra*, 349 US 133, 138. Here, as there,

> "the judge, whom due process requires to be impartial in weighing evidence presented before him, called on his own personal knowledge and impression of what had occurred . . . and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination."

Thus, when counsel for appellants Carbo and Sica requested permission to ask Judge Boldt some questions (RT 53), Judge Boldt required them to make an offer of proof (*ibid*). There-

upon appellants' counsel advised the Court (RT 55) that it was their desire that Judge Boldt answer the questions which had theretofore been made a part of the record in previous motion that Judge Boldt not preside at the hearing (Appendix B annexed hereto), the Court replied -- not as a witness, but as the Court (RT 57-58):

> "With respect to question 15 through 19, subdivisions a through g, I will say this, that it is my practice to review the transcript in proceedings similar to those which were had on July 17, 1964, in cause No. 27973-CD of this court, with a view of correcting grammar, correcting what I consider to be mistakes as to what was said, to eliminate repetition and to clarify precisely and exactly what my thought is. And it was for that purpose that I requested a copy of the transcript, for the purpose of doing that very thing.
>
> "The balance of the inquiries, the details that are indicated here, in my opinion, are, in the first place, incomprehensible and irrelevant to any inquiry before us.
>
> "All that I think it is necessary to say

on any of the balance of these questions 1 through 26 has already been said by the affidavit which I have filed in this proceeding."

This was not, we submit, responsive to the questions which had been put, and certainly did not permit of the cross-examination which is deemed to be the appropriate method for bringing out facts before a court.

The incongruity and the "spectacle" (*In re Murchison, supra,* 349 US at 139) "of the trial judge presenting testimony upon which he must finally pass in determining (whether to grant or deny petitioner's motion)" (paraphrased from *In re Murchison, ibid*) is seen from this further colloquy by the judge (RT 58):

"Now, I want to make it plain that I could have made that statement solely on my affirmation as a United States District Judge; and I suspect it would have had exactly the same significance, weight and value. But in order to emphasize that it was carefully and thoroughly prepared with a view to stating the exact and complete unqualified truth, I made it

in affidavit form. That statement, in my judgment, fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding."

To counsel's argument (RT 60-61) that the Court was "really . . . passing judgment upon your own statement," that a witness cannot say to a lawyer, "I have answered your question," that "only an impartial judge can say to a lawyer that his questions have been answered," and that "some other person (should) sit as judge over this matter as to whether your Honor's statement answers all of the questions which we seek to propound," the Court replied (RT 61): "I do not agree with you. I have already ruled on that matter previously, and I don't propose to hear you on it any further."

When appellants' counsel suggested (RT 61) to the Court, in connection with the offer of proof, that if Judge Boldt would permit himself to be questioned along the lines indicated in the written questions (Appendix B annexed hereto), "we expect to be able to demonstrate variances between (the three statements Judge Boldt had made)" and "inconsistencies and conflicts in those statements," but that (RT 62) "this is all we can offer to prove at this time because we do not know what's in your Honor's mind, and we don't know --," the Court

interrupted and said (*ibid*) (and we suggest this further demonstrates the error in Judge Boldt having presided at the hearing and in not having permitted himself to be a witness):

> "You do know what is in my mind because I have made a statement about it, that I in no manner whatever, at any time or place or under any circumstances in any manner whatever discussed any phase of the trial with Judge Tolin, either before or after verdict, or up until the time of his death. I have made that unqualifiedly on oath, and I now reaffirm it on my honor and integrity as a United States District Judge. And I simply cannot find any possible basis in the line of interrogation that you have indicated here that would lead to any other result or conclusion.
>
> "I make this most solemnly, and with a very, very heavy sense of obligation. I hold as high an office, in my judgment, as man is given to hold. And in the most solemn manner, and without any reservation whatever,

I am making this affirmation that I make.

"I need not have made it on oath, because I think the affirmation of a United States District Judge is more solemn than most affidavits that I have read."

And (RT 63):

" . . . And I make it so, and I make it out of the depth of my conscience, my experience, and my knowledge of what occurred. (Emphasis added.)

"And in my mind there is just no vestige of merit in your contentions, either of fact or in law, in this proceeding."

But, withal, the fact remains that appellant was deprived of the right to cross-examine and present in that way "what occurred." We submit that the very thing happened here that was condemned by the Supreme Court, again, in *In re Murchison, supra,* 349 US 133, paraphrasing therefrom (p. 139):

" . . . (petitioner's motion having been) heard before (Judge Boldt) the result (was both) that the (petitioner) (was) deprived of examining or cross-examining him (and there was) the spectacle of the trial judge presenting testimony upon which he must

finally pass in determining (whether to grant or deny petitioner's motion). In (both) event(s) the State (had) the benefit of the judge's personal knowledge while the (petitioner) (was) denied an effective opportunity to cross-examine. . . . "

"The chief function of our judicial machinery is to ascertain the truth" (*Estes v. Texas*, 381 US 532, 544). The denial of the right to cross-examine cannot be said to contribute to that objective. *Cf. Pointer v. Texas*, 380 US 400, 404. Judge Boldt should not have presided at the hearing; he should, however, have been a witness therein. And the presence of the former and the absence of the latter denied appellant due process and a fair hearing.

II

THAT THE SUCCESSOR JUDGE PASSED UPON APPELLANT'S MOTION FOR NEW TRIAL, THE JUDGE HAVING THERETOFORE RECEIVED INFORMATION *CORAM NON JUDICE* CONCERNING THE CASE, DEPRIVED APPELLANT OF LIBERTY WITHOUT DUE PROCESS OF LAW.

Our argument here would be just the same as that made in the Carbo case. As we have heretofore stated, the cases are exactly alike, and we respectfully ask the Court to refer to

the Opening Brief of Appellant Paul John Carbo. We do hereby adopt the argument advanced under heading II therein as our argument here, in the interest of brevity. The argument with reference to this point will be found at pages 23 to 31, inclusive, of the Carbo opening brief.

III

THE ADMINISTRATION OF CRIMINAL JUSTICE MUST NOT ONLY BE FAIR, IT MUST GIVE THE APPEARANCE OF FAIRNESS

We do not believe that this proposition can be better stated than it was stated in

In re Murchison, supra, 349 US 133,

at page 136, where the Court says:

> " . . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a

possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'"

Citing:

Tumey v. Ohio, 273 US 510, 532.

And continuing:

"Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Citing:

Offutt v. United States, supra, 348 US 11, 14.

As the great writer said, "Caesar's wife must be above suspicion."

Again, under this point, may we respectfully direct the Court's attention to the argument commencing on page 31 of the Carbo brief, where it commences, "In *Berger v. United States*, 255 US 22, 35-36," to the ending of the quotations and argu-

ment at the bottom of page 35, and do adopt this argument in support of our contention, as fully as if made herein, and to this end, we do ask the Court's indulgence.

CONCLUSION

The judgment below should be reversed.

This Court should order that the sentence previously imposed upon appellant and the order denying motion for new trial be vacated and set aside and that a new and different judge, other than the Hon. George H. Boldt, be appointed to pass upon the motion for new trial or, in the alternative and at a minimum, that a new hearing of the 28 USC 2255 motion be held and that said hearing be presided over by a judge other than the Hon. George H. Boldt.

We further pray on behalf of appellant Joseph Sica that justice would well be served by the granting of a new trial, in view of all of the foregoing, by this Court.

We further adopt and make a part hereof Appendix A and B attached to the Carbo brief, which are similarly attached hereto.

Respectfully submitted,

RUSSELL E. PARSONS

Attorney for Appellant
Joseph Sica

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, RUSSELL E. PARSONS, attorney for the above-named appellant JOSEPH SICA, do hereby certify that I have examined the provisions of Rules 18 and 19 of the above-entitled Court, and that in my opinion the tendered brief on behalf of Joseph Sica conforms to all requirements.

DATED: OCTOBER 13, 1965.

Russell E. Parsons

INDEX OF APPENDICES

APPENDIX "A"

LIST OF EXHIBITS

No.	Identified	Received
Petitioner's 1	32	34
Petitioner's 2	33	35
Petitioner's 3	37, 45	46

APPENDIX "B"

SOME QUESTIONS WHICH COUNSEL FOR PETITIONER INTENDED TO PUT TO JUDGE GEORGE H. BOLDT AT THE HEARING ON PETITIONER'S MOTION PURSUANT TO 28 USC 2255

1. Did you have occasion to see Judge Tolin during any time in 1961?

2. Please state the date, and place of each such occasion, and who was present or were present.

3. Please state the conversation, if any, at each of such occasions.

4. Were any of these occasions at lunch?

5. On July 17, 1964, did you have in mind Judge Tolin's views of the case of *United States v. Carbo et al.*, No. 27973?

6. On July 17, 1964, did you have in mind Judge Tolin's views of the case before the verdict in the case?

7. On July 17, 1964, did you have in mind Judge Tolin's views of the case after the verdict in the case?

8. Did you and Judge Tolin talk about the case?

9. If so, when, where and in whose presence?

10. What was said and by whom?

11. What were Judge Tolin's views of the case, before the verdict, that you had in mind, on July 17, 1964?

12. What were Judge Tolin's views of the case after the verdict, that you had in mind on July 17, 1964?

13. What is the basis for your statement on July 17, 1964, that you could say and affirm without any question whatsoever that the sentences you imposed you believed to be more lenient than those that Judge Tolin would have imposed?

14. What was your belief, on July 17, 1964, as to what sentences Judge Tolin would have imposed:

As to defendant Carbo?

As to defendant Sica?

As to defendant Palermo?

As to defendant Dragna?

As to defendant Gibson?

15. Did you instruct, in July 1964, Court Reporter Samuel Goldstein to make any changes in the transcript of the proceedings of July 17?

16. What were those instructions?

17. Did you instruct the changes to be made because, in your opinion, the draft of the transcript submitted to you by Mr. Goldstein was inaccurate?

18. Did you, on July 17, 1964, make the statements as set forth in the transcript thereof, first submitted to you by Mr. Goldstein?

19. Please explain the reason for each of the following changes in the transcript ordered by you:

a. Deletion of the word "And" after the

phrase "or some remarks of Judge Tolin concerning it";

b. Deletion of the word "and" after the phrase "and quite often saw each other at lunch";

c. Deletion of the word "see" in the phrase "I had occasion to see Judge Tolin after the verdict in this case" and substituting therefor the words "talk with";

d. Deletion of the words "I had" in the phrase "and I had some ideas of his views of the case" and substituting therefor the word "received";

e. Deletion of the words "of the" from the phrase "and I had some ideas of his views of the case" and inserting in lieu thereof the words "after the verdict in this";

f. Deletion of the words "From that" in the phrase "From that I can say and affirm without any question";

g. Deletion of the word "would" in the phrase "than those that Judge Tolin would have imposed" and inserting in lieu thereof the word "might".

20. Is it your customary practice to form an impression, upon knowing that a fellow judge is presiding over a long criminal trial and appears to be laboring under a heavy burden of concern and strain, that therefore that judge will impose upon the defendants in such a case a severe sentence?

21. Have you ever formed such an impression under such

circumstances with respect to any judge, other than Judge Tolin in the instant case?

22. If so, please state the circumstances.

23. Have you, as a Judge of a United States District Court, ever labored under a heavy burden of concern and strain in a criminal case?

24. If so, have you, because of such burden, imposed severe penalties on defendants?

25. Did you labor under a heavy burden of concern and strain in the course of your duties as Judge in the instant case?

26. When you observed Judge Tolin, did you know that he had had at least two heart attacks, that he was suffering from agina pectoris, and that he was under a physician's care?

APPENDIX "C"

MOTION PURSUANT TO 28 USC 2255 TO VACATE AND SET ASIDE SENTENCE AND FOR OTHER RELIEF

In the United States District Court, Southern District of California, Central Division,

JOSEPH SICA, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.

Russell E. Parsons, Edward I. Gritz, Attorneys for Petitioner-Movant Joseph Sica.

Case No. 65-91-Boldt (Ancillary to No. 27973 CD).

Filed January 20, 1965.

COMES NOW Joseph Sica and moves the Court pursuant to 28 USC 2255:

(1) to vacate and set aside sentences heretofore imposed;

(2) to vacate and set aside order denying motions for new trial;

(3) to appoint a new and different successor judge (one other than Hon. George H. Boldt) pursuant to Rule 25, Federal Rules of Criminal Procedure to pass upon petitioner's motions for new trial;

(4) to grant a hearing and, as part of said hearing that Judge Boldt be permitted, *sua sponte*, to testify,

and/or invited to testify and/or directed to testify; and

(5) that a United States District Judge, other than Hon. George H. Boldt, be designated to pass upon the instant motion.

Said motion is made on the ground that petitioner was deprived of liberty without due process of law, in violation of the Fifth Amendment to the United States Constitution in the following respects:

(1) that Hon. George H. Boldt, the successor judge heretofore appointed pursuant to said Rule 25 after the death of Hon. Ernest A. Tolin, the judge who tried the case, received prior to his appointment, information *coram non judice* concerning the case pertaining to matters upon which he thereafter was to adjudicate, in motions for a new trial;

(2) that said successor judge relied upon said extrajudicially received information in exercising his function in passing upon said motions for a new trial; and

(3) the fact that said successor judge received such prior extrajudicial information was not disclosed by said successor judge, and was not known, to petitioner nor to his counsel until after petitioner had exhausted his right to appeal, including petition for writ of *certiorari* in the

United States Supreme Court; and the nature of such extra-judicial information has never been disclosed to, and is not now and never has been known to petitioner or his counsel.

Said Motion is based upon the Petition of Joseph Sica, the Memorandum of Points and Authorities attached hereto and upon all the records and files in this case.

DATED: January 20, 1965.

RUSSELL E. PARSONS &

EDWARD I. GRITZ

BY: RUSSELL E. PARSONS

Attorneys for Petitioner-Movant

APPENDIX "D"

OBJECTIONS TO JUDGE HONORABLE GEORGE H. BOLDT, U. S. DISTRICT JUDGE, PRESIDING AT THE HEARING IN CONNECTION WITH THIS MATTER, OR ACTING IN ANY MANNER

In the United States District Court, Southern District of California, Central Division.

JOSEPH SICA, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.

Russell E. Parsons, Edward I. Gritz, Attorneys for Petitioner-Movant Joseph Sica.

Case No. 65-91-BOLDT (Ancillary to No. 27973 CD).

Filed February 1, 1965.

COMES NOW petitioner and movant, Joseph Sica, and respectfully objects to the Honorable George H. Boldt, District Judge, presiding on the hearing of petitioner Sica's motion pursuant to 28 U.S.C. 2255 to vacate and set aside the sentence, judgment and for other relief which hearing is presently for February 2nd, 1965, at Los Angeles, California.

The grounds for said objections are set forth in the motion and verified petition of Joseph Sica, with Points and Authorities attached, and the affidavit of the Honorable George H. Boldt, United States District Judge, dated January

21, 1965, and filed herein, and upon motion to vacate order of January 22, 1965, filed by petitioner Paul John Carbo in case No. 65-40-Boldt, ancillary to No. 27973 CD, and said Carbo's Memorandum in support of motion to vacate order of January 22, 1965, setting cause for hearing, and all of the points and arguments in said memorandum set forth and the same, and all of the files and records in this matter are hereby made a part of this objection by reference, as fully as if set forth herein in detail.

DATED: at Los Angeles, California, this 1st day of February, 1965.

RUSSELL E. PARSONS &

EDWARD I. GRITZ

BY: RUSSELL E. PARSONS

Attorneys for Petitioner and Movant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on October 14, 1965, I served the within Opening Brief of Appellant Joseph Sica on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 1965, at Los Angeles, California.

D. A. Standefer
Signature

Orig. & 20 copies:

Frank H. Schmid, Esq.
Clerk, U. S. Court of Appeals
For the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101

DEAN-STANDEFER Multi Copy Service, 215 West Fifth Street, Los Angeles, California 90013 - MAdison 8-6898